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No. 99-7791

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND
IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service's (INS) continued detention of an alien who is subject to a final order of deportation but whose deportation cannot be effectuated immediately, violates substantive due process, where the alien's custody is reviewed automatically by the INS on a periodic basis to determine whether he would present a danger to society or a flight risk if released.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B at 279-297) is reported at 185 F.3d 279. The opinion of the district court (Pet. App. A at 1-17) is reported at 986 F. Supp. 1011.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on October 13, 1999. Pet. App. C at 1. The petition for a writ of certiorari was filed on January 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner was born in a displaced persons camp in Germany in 1948. His parents were both from Lithuania. In 1956, petitioner immigrated with his family to the United States and became a resident alien. Despite his long residence in the United States, petitioner never became a citizen of this country. Pet. App. B at 283, 291.

On December 8, 1966, petitioner was convicted of attempted robbery, third degree, in New York state court. Pet. App. A5. Petitioner was sentenced to six years' imprisonment and served five years of that sentence. C.A. R.E. Exh. 8, at 3. On August 31, 1973, petitioner was arrested on auto theft charges and ultimately was convicted on the basis of a guilty plea. Id. at 4. In 1974, petitioner was convicted on charges of attempted burglary, third degree, in New York state court. Pet. App. A at 5. He was sentenced to one and a half to three years' imprisonment. C.A. R.E. Exh. 8, at 4. Petitioner "admitted that he had failed to appear three times on the burglary charge in the 1970's." C.A. R.E. Exh. 6, at 3. During his subsequent incarceration on the burglary charge, petitioner was punished for escape based on his violation of the terms of a furlough or work release program by returning several days late. C.A. R.E. Exh. 8, at 4.[1]

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[1] Petitioner's early criminal history also reflects a juvenile record, a charge of car theft in 1964, and a trespass conviction in 1975. C.A. R.E. Exh. 6, at 2-3.

b. On July 6, 1977, the Immigration and Naturalization Service (INS) issued petitioner an order to show cause why he should not be deported. Pet. App. A at 5. INS charged petitioner with being deportable under 8 U.S.C. 1251(a)(4) (1976), as an alien who had been convicted of two crimes involving moral turpitude. C.A. R.E. Exh. 5, at 2 & n.1. Petitioner applied for relief from deportation under 8 U.S.C. 1182(c) (1976). C.A. R.E. Exh. 5, at 2-3.

On July 13, 1977, INS granted petitioner release on his own recognizance pending disposition of his deportation proceeding. Pet. App. A at 5. According to the conditions of his release, petitioner was required to obtain INS's permission before changing his place of residence, to report to INS any change of address or employment, and to report to the INS office in New York on August 31, 1977. C.A. R.E. Exh. 8, at 5.

An immigration judge (IJ) remanded petitioner's case to the INS for adjudication of petitioner's application for relief under 8 U.S.C. 1182(c) (1976). C.A. R.E. Exh. 8, at 5. That application was ultimately denied by INS on February 10, 1982. Ibid. In July 1982, INS notified petitioner that his hearing before an IJ was rescheduled for August 25, 1982. Pet. App. A at 5. Petitioner failed to appear for the hearing. Ibid.

INS's attempts to locate petitioner were unsuccessful. He was not heard from again until he was arrested ten years later, in 1992, in Houston, Texas, on drug charges for which he had been

initially arrested in Virginia in 1987. Pet. App. A at 5. Petitioner had fled from Virginia to avoid the drug charges, C.A. R.E. Exh. 8, at 4, and "was in hiding from 1987 until he surrendered himself to the [Texas] authorities in 1992." C.A. R.E. Exh. 6, at 3.

On August 17, 1992, petitioner was convicted in Virginia state court of possession of 474 grams of cocaine with intent to distribute it. Pet. App. A at 5; Pet. App. B at 283. He was sentenced to sixteen years' imprisonment, with six years suspended. Petitioner served two years' imprisonment on that sentence and was then released on parole in January 1994 to the custody of the INS. Pet. App. A at 5; Pet. App. B at 283.

2. a. On January 24, 1994, INS issued petitioner an order to show cause why he should not be deported, charging him with being deportable under 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. V 1993), as an alien convicted of two crimes involving moral turpitude; under 8 U.S.C. 1251(a)(2)(B)(i) (Supp. V 1993), as an alien convicted of a controlled substance offense; and under 8 U.S.C. 1251(a)(2)(A)(iii) (Supp. V 1993), as an alien convicted of an aggravated felony. C.A. R.E. Exh. 9, at 1-2.

INS detained petitioner under 8 U.S.C. 1252(a)(2) (Supp. V 1993) pending completion of the deportation proceedings, based on his conviction of an aggravated felony. C.A. R.E. Exh. 6, at 1. Petitioner requested redetermination of his custody status, and a bond redetermination hearing was held by an IJ on February 28,

1994. Ibid.

On March 14, 1994, the IJ denied petitioner's requested change in bond. C.A. R.E. Exh. 6, at 1-4. The IJ noted that, in order to obtain release under 8 U.S.C. 1252(a)(2)(B)(Supp. V 1993) during the pendency of deportation proceedings, petitioner bore the burden of establishing that he was lawfully admitted, not a threat to the community, and likely to appear at any scheduled hearings. C.A. R.E. Exh. 6, at 2. The IJ denied petitioner release based on the flight risk he posed. The IJ determined that petitioner's five-year flight from prosecution on the drug charges and information brought out on cross-examination of petitioner, apparently including an arrest by the FBI for flight to avoid prosecution, cast serious doubt on the likelihood that petitioner would appear at future hearings. Id. at 3. On April 8, 1994, the Board of Immigration Appeals dismissed petitioner's appeal from that decision. C.A. R.E. Exh. 7, at 1.

b. Meanwhile, the deportation proceedings continued on the merits. At a hearing before an IJ on March 29, 1994, petitioner admitted all allegations and was found deportable as charged. Pet. App. A at 5. Petitioner applied for a waiver of deportation under 8 U.S.C. 1182(c) (Supp. V 1993). A hearing on the waiver application was held on April 26, 1994. Pet. App. A at 5.

On May 2, 1994, the IJ issued a decision denying petitioner relief from deportation. C.A. R.E. Exh. 8, at 1-10. Because petitioner entered the United States before 1972, the IJ

considered whether petitioner qualified for registry under 8 U.S.C. 1259 (1988 & Supp. V 1993), but determined that petitioner could not meet the statutory requirement of good moral character because of his conviction of an aggravated felony. C.A. R.E. Exh. 8, at 2.

The IJ also denied petitioner's request for a waiver under 8 U.S.C. 1182(c) (Supp. V 1993). The IJ first recognized as favorable factors petitioner's family ties in the United States and his residency here for over 37 years, and found that petitioner had thus demonstrated outstanding equities in his favor and that he would suffer extreme hardship if deported to Germany. C.A. R.E. Exh. 8, at 8-9. The IJ concluded, however, that petitioner's favorable equities were "diminished by [petitioner's] criminal history which began in June of 1966 and spans 27 of his 37 years of residence. For most of the last 27 years, [petitioner] has been either engaged in criminal activity, in prison, or a fugitive." Id. at 8. The IJ noted that none of petitioner's many family members in the United States provided any affidavits or testimony in support of petitioner, which led the IJ to question the strength of petitioner's relationship with those family members. Ibid. The IJ also observed that petitioner's repeated incarceration had previously kept him separated from his family. Ibid. The IJ could not find that petitioner had made a showing of genuine rehabilitation, taking note of petitioner's minimization of his participation in the

1987 drug-trafficking scheme, and "of the fact that [petitioner] absconded during the pendency of deportation proceedings in 1973, abused the privilege of a supervised release from prison in 1976, fled to avoid prosecution in 1987, and was a fugitive from justice from 1987 until 1992." Id. at 9. The IJ therefore concluded that a favorable exercise of discretion was not warranted in this case. Ibid.

At the time of the deportation hearing, it was believed that petitioner was a citizen of Germany, C.A. R.E. Exh. 8, at 1; see also Sept. 27, 1996, Tr. 42 (petitioner testified that he thought that he was a German citizen until he and INS learned otherwise), and the IJ ordered that petitioner be deported to Germany. C.A. R.E. Exh. 8, at 10. Petitioner did not appeal that decision, and it accordingly became final. Pet. App. B at 283.

3. In May 1994, an INS official began the process for obtaining travel documents from Germany so that INS could effectuate petitioner's deportation. Pet. App. A at 5. After INS's submission of the necessary application to the German Consulate, Germany informed INS on June 28, 1994, that it had determined that petitioner is not a German citizen. Ibid.; C.A. R.E. Exh. 5, at 5.

On July 26, 1994, INS sent a formal written request to the Lithuanian Consulate for a travel document for petitioner based on his Lithuanian parentage. C.A. R.E. Exh. 5, at 5. On August 22, 1994, the Lithuanian Consulate responded by refusing to issue

petitioner a travel document because he is not a citizen or permanent resident of Lithuania. Ibid.; Pet. App. B at 284. On October 3, 1994, INS Headquarters formally requested permission from Lithuania for the return of petitioner to that country. C.A. R.E. Exh. 5, at 5.

4. On January 9, 1995, petitioner filed a motion to reopen his deportation proceedings, contending that he is eligible for a waiver of deportation under 8 U.S.C. 1182(c) (Supp. V 1993). C.A. R.E. Exh. 9, at 2. On January 19, 1995, an IJ denied the motion because it was not accompanied by an application for relief under Section 1182(c), and because petitioner could not make a prima facie showing of eligibility for the relief requested. Id. at 3.

5. INS continued its efforts to obtain travel documents for petitioner from Germany. The German Consulate obtained further information and engaged in additional research, but ultimately again denied the request in May 1995. C.A. R.E. Exh. 5, at 5-6; Pet. App. B at 284.

In October 1996, INS again contacted the Lithuanian Consulate, this time to determine how a person could obtain Lithuanian citizenship if he was born of Lithuanian parents in another country. Pet. App. B at 284. INS was informed that petitioner could apply for citizenship if he could prove that his parents were born in Lithuania before 1940. Id. at 284, 292. On April 23, 1997, INS forwarded another formal request for travel

documents to the Consulate of Lithuania. INS enclosed documents reflecting the baptism of petitioner's mother and the marriage of petitioner's parents in Lithuania. C.A. R.E. Exh. 11, at 1-2. Subsequently, the Lithuanian government provided additional information about the type of documentation that petitioner should present to it. Pet. App. B at 284.[3]

6. Meanwhile, in September 1995, petitioner commenced the instant action by filing a petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his continued detention violated the Eighth Amendment, due process, and international law. Pet. App. B at 284.

a. On February 3, 1997, a magistrate judge issued a report recommending that the petition be denied. C.A. R.E. Exh. 5, at 1-24. The magistrate judge found that petitioner's continued detention under 8 U.S.C. 1252(a)(2)(A) and (B) (1994) was "statutorily authorized and does not constitute an abuse of the Attorney General's broad discretion in immigration matters," C.A. R.E. Exh. 5, at 7. The magistrate judge held that petitioner's detention did not violate substantive due process because the purpose of his detention was not punishment, but rather was to further the government's compelling interest in protecting the community and its legitimate interest in preventing aliens from

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[3] In addition, INS issued an unsuccessful request for travel documents to the Consulate of the Dominican Republic because petitioner's wife is a native of that country. Pet. App. B at 284.

absconding before they are deported. Id. at 10-15. The magistrate judge also held that petitioner was not being unlawfully imprisoned for an indefinite time in violation of international law or the Eighth Amendment because INS's efforts to effectuate his deportation were ongoing. Id. at 22-23.

b. On October 30, 1997, the district court issued an order granting petitioner habeas relief, Pet. App. A at 1-17, holding that his continued detention violated substantive due process, id. at 13-17. As a threshold matter, the court held that petitioner's detention was consistent with INS's statutory authority under 8 U.S.C. 1252(a)(2)(A) and (B) (1994) because, "[c]onsidering petitioner's recidivist history and his prior episode of 'bond jumping,' petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings." Id. at 14. The court noted that Congress nowhere placed a time limit on the detention of aggravated felons, such as petitioner, who cannot meet the statutory standards for release and whose immediate deportation is not possible. Ibid.

Turning to the constitutional claim, the district court recognized that "protecting the community from aggravated felons and preventing aliens from absconding before deportation are legitimate governmental policy goals that, can warrant a deprivation of liberty under the proper circumstances." Pet. App. A at 15 (internal quotation marks omitted) (citing United

States v. Salerno, 481 U.S. 739 (1987)). The court held, however, that "petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served" by 8 U.S.C. 1252(a) (1994). Pet. App. A at 16. The court also held that petitioner's detention could not be characterized as temporary because petitioner "will never be deported because there is no place to send him." Ibid. Petitioner was then released under conditions imposed by the district court. Pet. App. B at 284.[3]

7. The court of appeals reversed. Pet. App. B at 279-297. The court first reviewed the various statutory regimes that have governed immigration detention over the past several years and agreed with INS that petitioner's current detention is governed by 8 U.S.C. 1231(a)(6) (Supp. IV 1998). Pet. App. B at 286-287. The court recognized that Section 1231(a)(6) authorizes detention of criminal aliens like petitioner after entry of a final order of deportation, "but makes it discretionary beyond an initial ninety day period." Id. at 286. The court then analyzed the constitutional question based on the assumption that petitioner

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[3] On December 19, 1997, the district court denied the government's motion to alter or amend the judgment, noting that the court "was fully aware that petitioner is theoretically eligible to be considered for release by the INS and that he may again and again apply to the INS for a change in custody status." C.A. R.E. Exh. 3, at 1. The court stated that that did "not alter the Court's conclusion that this petitioner's detention had no end in sight." Ibid.

will be able to obtain periodic review of his detention under INS regulations, which "authorize the release of such aliens when it is determined that the alien 'is not a threat to the community and is likely to comply with the removal order.'" Id. at 287 (citing 8 C.F.R. 236.1(d), 241.4, and 241.5). The court pointed out that those regulations have been "explained and expounded in the February 3, 1999, 'Memorandum for Regional Directors' from INS Executive Associate Commissioner Michael A. Pearson concerning 'Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable,'" under which INS reviews the custody status of detained aliens every six months to determine whether there has been a change in circumstances warranting release; INS documents the alien's file to show reasons for detention decisions; and if an alien requests a custody review in writing and that request is denied, the alien may appeal that decision to the Board of Immigration Appeals. The court of appeals also noted that "[t]he district court found that the INS did not err in determining that [petitioner] posed a danger to the community and a flight risk," and that "[s]hould [petitioner] no longer do so, he would doubtless be released." Id. at 288.

Next, the court of appeals reviewed the broad authority of the political Branches over immigration matters, noting that it is "largely immune from judicial control" and that "[t]he power of the national government to act in the immigration sphere is

thus essentially plenary." Pet. App. B at 288-289. The court explained that, in Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1448, amended by 997 F.2d 1122 (5th Cir. 1993), it had held, in accordance with those principles, "that excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return." Pet. App. B at 290 (also citing Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) (accord with Gisbert)). The court explained that, "[d]rawing on the reasoning of Mezei," it had found in Gisbert that "detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision." Ibid.

The court rejected petitioner's attempt to distinguish his case from Gisbert and Mezei on the ground that, unlike the aliens involved in those cases who were excludable aliens because they were stopped at the border and not allowed entry, petitioner had previously been admitted for permanent residence. The court recognized that petitioner's status as a resident alien entitled him to greater procedural due process during the deportation proceedings themselves, in which the IJ determined whether petitioner would retain his permanent resident status. But the court did "not believe that the difference between excludable

aliens and resident aliens mandates a radical departure from the reasoning of Gisbert when, as here a final decision to deport the once resident alien has been made and stands unchallenged." Pet. App. B at 290. The court emphasized that, when a permanent resident alien becomes the subject of a final order of deportation, that alien is no longer a permanent resident, and "[t]he need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin." Id. at 296. The fact that the government cannot immediately effectuate a deportation does not alter the analysis, the court reasoned, because, regardless of whether the alien is a former resident or is excludable, the government has an interest in protecting society from any threat to the community or risk of flight that the alien's release would pose. Id. at 296-297.

The court also ruled that the district court "considerably overstate[d] the matter" when it characterized petitioner's continued detention as permanent. Pet. App. B at 291. It pointed to the regulatory procedures for automatic, periodic administrative review of petitioner's detention and the fact that the Ninth Circuit has held that an analogous regulatory scheme for review meant that an alien's detention is not indefinite or permanent. Ibid. (citing Barrera-Echavarria, 44 F.3d at 1450). The court also found that it would be premature to conclude that

petitioner will never be deported. The court recounted the various communications between INS officials and Lithuania and concluded that "[c]ertainly there has been no definitive denial by Lithuania of any application for citizenship by [petitioner]." Id. at 292-293. The court also noted two other possibilities that remained to be explored -- a different claim of German citizenship based on ethnic German ancestry through petitioner's mother, and a claim of Russian citizenship because of Russia's control over Lithuania at one point and the fact that some of petitioner's relatives apparently live there. Id. at 293-294. The court reasoned that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant." Id. at 294.

ARGUMENT

Petitioner contends that the court of appeals erred in upholding the constitutionality of petitioner's detention by the Immigration and Naturalization Service (INS). The decision of the court of appeals is correct, however, and it does not warrant review by this Court.

1. Subsequent to the filing of the certiorari petition in this case, the Tenth Circuit issued a decision in accord with the decision below. In Ho v. Greene, 204 F.3d 1045 (2000), the Tenth

Circuit held, inter alia, that once a final order of deportation has been entered against a resident alien, that alien has no greater right with respect to release into this country than does an alien seeking to enter the country for the first time. Id. at 1058-1059 (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)). The Tenth Circuit therefore concluded that such an alien does not have a liberty interest in being admitted to the United States and that there is no substantive or procedural due process impediment to the continued detention. Id. at 1059-1060. No court of appeals has held to the contrary on the constitutional issue.

More recently, the Ninth Circuit issued a decision granting habeas relief in a similar case, but based on statutory rather than constitutional grounds. In Ma v. Reno, No. 99-35976, 2000 WL 358445 (Apr. 10, 2000), the Ninth Circuit construed 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to preclude INS detention of an alien beyond the statutory 90-day removal period following entry of a final order of removal if "there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future." Ma, 2000 WL 358445, at *1.

Although the result in Ma is inconsistent with the result reached by the Fifth Circuit in this case, the Fifth Circuit did not address the statutory issue decided by the Ninth Circuit in Ma, and the Ninth Circuit in Ma did not reach the constitutional issue decided by the Fifth Circuit in this case. There

accordingly is no conflict between the Fifth Circuit and the Ninth Circuit on either the statutory issue or the constitutional issue. The Tenth Circuit in Ho, however, did reject the statutory argument, later adopted by the Ninth Circuit in Ma, that an implicit time limit on an alien's continued detention should be read into 8 U.S.C. 1231(a)(6) (Supp. IV 1998). 204 F.3d at 1057. The Tenth Circuit held that Section 1231(a)(6) "expressly allows for continued detention beyond the removal period with no time limit placed on the duration of such detention," and it declined to "substitute its judgment for that of Congress." Ibid.[4] We agree with the Tenth Circuit (see id. at 1055-1057) and believe that the Ninth Circuit's contrary statutory ruling is inconsistent with both the plain language of

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[4] The Third Circuit, in Ngo v. INS, 192 F.3d 390 (1999), and the Ninth Circuit, in Barrera-Echavarria v. Rison, 44 F.3d 1441 (en banc), cert. denied, 516 U.S. 976 (1995), have rejected constitutional challenges to long-term detention following final orders of exclusion where the alien's immediate repatriation was not possible or practicable. In Ngo, the Third Circuit held that due process is not violated by continued detention when the alien's country of origin refuses to allow the alien's return, so long as there is a possibility of the alien's eventual departure, there are adequate and reasonable custody review procedures, and detention is necessary to protect the community or prevent flight. 192 F.3d at 397. The Third Circuit cited with approval the ruling in the instant case that "once an order of deportation is final, no distinction exists between the rights of resident aliens and those ordered removed as excludable." Ibid.

In Barrera-Echavarria, the Ninth Circuit sitting en banc held, in the similar context of excludable Mariel Cubans whose immediate repatriation is not possible, that continued detention of an alien is constitutional where the alien is afforded the opportunity, on an annual basis, to demonstrate to the INS that he would no longer pose a threat to the community or a flight risk if released. 44 F.3d at 1450.

the statute and the history of the provision and its predecessor statutes, which indicates that Congress has embraced prior administrative practice and the weight of judicial authority sustaining the Attorney General's detention authority under similar conditions. The Ninth Circuit also failed to afford the Attorney General's interpretation the deference it is due under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

In light of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, review by this Court of the constitutional issue in the instant case would be premature. This case, moreover, would be an inappropriate vehicle for consideration of the statutory argument accepted in Ma. That argument was not addressed in this case by the Fifth Circuit, and the statutory issue is not included in the question presented in the petition or in petitioner's supplemental brief. Review of the statutory issue by this Court would in any event be premature as well. The United States has filed a petition for rehearing en banc in the Ninth Circuit in the Ma case, which, if granted, could lead to elimination of the disagreement between the Ninth and Tenth Circuits on the statutory issue. It is significant for purposes of en banc review in Ma that the Ma panel ruled on the statutory issue without benefit of briefing by the parties on that issue and without the benefit of any consideration of that issue by the

district court in that case.[5] For these reasons, the Ninth Circuit's decision in Ma on the statutory issue does not warrant review of the constitutional issue in this case.

2. Petitioner's insistence (Pet. 9, 13-17) that lawful permanent resident aliens possess greater constitutional rights than do excludable aliens with respect to their continued detention following entry of a final order of removal ignores the fact that petitioner is no longer a lawful permanent resident alien. Once a final order of deportation was entered against petitioner, that status was extinguished. See 8 U.S.C. 1101(a)(20) and (47)(B)(ii) (1994 & Supp. IV 1998); 8 C.F.R. 1.1(p); 3.39, 241.1; Pet. App. B at 296 ("When a former resident alien is * * * finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision."). The forfeiture of that right, in turn, has extinguished any right petitioner had as a lawful permanent resident to be at large in the United States.

The court of appeals properly held that such a former resident alien awaiting execution of an order of removal stands essentially on the same footing as an excludable alien who has been ordered removed after seeking to enter the United States for the first time. Pet. App. B at 297. Like an excludable alien,

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[5] One of the habeas petitioners has requested rehearing en banc in the Tenth Circuit in the Ho case.

petitioner no longer has any legal right to be present in the United States. The United States' interest in effectuating his return to another country is the same as its interest in returning excludable aliens -- it is based on the United States' interest in protecting its national sovereignty and not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country. Moreover, as the court of appeals recognized, the alien's lack of a right to be present in the United States and the government's countervailing interests in protecting against danger to the community and effectuating removal are the same in the two situations. Pet. App. B at 288-290, 294-297.

3. This Court has held that Congress's plenary power over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); see also Reno v. Flores, 507 U.S. 292, 305 (1993). Contrary to petitioner's contention (Pet. 10, 17-21), Congress's plenary power over immigration encompasses matters of immigration detention. This Court has recognized the authority of Congress and the Executive Branch to detain an alien as a means of enforcing their decision that the alien is not entitled to be admitted into the United States. See Mezei, 345 U.S. at 216; cf. United States v. Salerno, 481 U.S. 739, 748 (1987)

("Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings."). Accordingly, the Court has adopted a very deferential standard of review in cases involving the Attorney General's immigration detention authority. Carlson v. Landon, 342 U.S. 524, 540 n.33 (1952); Flores, 507 U.S. at 309.

The court of appeals correctly held that immigration detention relates to the conduct of foreign policy and thus warrants substantial deference. See Pet. App. B at 294. This Court has stated that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). And as both the Fifth Circuit in the instant case and the Third Circuit in Ngo emphasized in considering the constitutionality of continued detention of aliens awaiting removal, even though aliens can claim some constitutional protections, "[t]he power of the national government to act in the immigration sphere is * * * essentially plenary," and, as such, is "'largely immune from judicial * * * interference.'" Pet. App. B at 289 (quoting Harisiades, 342 U.S. at 589); see also Ngo, 192 F.3d at 395. The detention of aliens for the purpose of facilitating their removal

implicates the same foreign policy concerns that have led this and other courts to eschew intervention in the past. See, e.g., Mezei, 345 U.S. at 216; Barrera-Echavarria, 44 F.3d at 1448. As the Fifth and Ninth Circuits have recognized, critical foreign policy implications arise if another country can force the United States to allow that country's nationals to be at liberty in the United States by refusing to allow them to return. See Gisbert, 988 F.2d at 1447 ("The United States cannot be forced to violate its national sovereignty in order to parole [criminal] aliens within its borders merely because [the native country] is dragging its feet in repatriating them."); Barrera-Echavarria, 44 F.3d at 1448 ("Reading a time limit on detention [of excludable aliens] would risk frustrating the government's ability to control immigration policy and relations with foreign nations."); see also Mezei, 345 U.S. at 216 ("Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs."); cf. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'"; "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.").

4. Petitioner challenges (Pet. 11-12, 21-23) the court of

appeals' characterization of the liberty interest at stake, but he does not identify any authority from this Court to support his apparent claim (Pet. 23-28) of an entitlement, as a former resident alien, to a liberty interest akin to that of a citizen.

As the court of appeals pointed out, petitioner did not challenge the ruling by the district court that "the INS did not err in determining that [petitioner] posed a danger to the community and a flight risk," and petitioner will be released in the future if he persuades the INS that he no longer presents those risks. Pet. App. B at 288. Moreover, petitioner disregards his extended history of absconding from the jurisdiction of INS and the courts and of eluding government authorities. See pp. 2-4, 5, 6-7, supra (recounting petitioner's failure to appear at a scheduled immigration hearing and subsequent lack of contact with INS for ten years; his violation of conditions imposed on his immigration release, including his obligation to keep INS apprised of his current residence; his failure to appear at a state court criminal proceeding; his violation of the conditions of release when on a furlough or work release program; his absconding from a state criminal prosecution; and his remaining in hiding for five years as a fugitive from law enforcement). Petitioner's belated attempt to refute the finding of dangerousness (Pet. 25 n.7) also ignores his serious criminal history, including his most recent conviction for possession of 474 grams of cocaine with intent to

distribute it. Pet. App. B at 283.

The court of appeals correctly recognized that the government's interest in detaining petitioner in these circumstances is in ensuring that the Attorney General is free to exercise her statutorily delegated authority to ensure that aliens will not flee if released and to afford adequate protection to the community against further criminal conduct by persons who have no lawful right to be in the United States. Pet. App. B at 296-297; cf. Doherty v. Thornburgh, 943 F.2d 205, 211 (2d Cir. 1991) ("Detention of Doherty is not an end in itself sought by the Attorney General; rather, bail has been denied in order to preserve the government's ability to later carry out its broader responsibilities over immigration matters."), cert. dismissed, 503 U.S. 901 (1992). Congress has assigned that responsibility not to the courts in the first instance, based on a de novo weighing of the factors, but to the Attorney General, subject to review by the courts on habeas corpus only under a highly deferential standard of review. Flores, 507 U.S. at 306; Carlson, 342 U.S. at 538-541.

Petitioner nonetheless argues, based on his prediction that he will never be deported, that his detention is unconstitutionally indefinite. Pet. 24-27. That assessment, which is contrary to the considered judgment of the Executive Branch, is both erroneous and legally insufficient to render petitioner's detention in the present circumstances a violation

of substantive due process. As the Fifth Circuit explained, petitioner's detention cannot fairly be characterized as indefinite or permanent, Pet. App. B at 291, 294, in light of (a) the existence of procedures, recently augmented by INS and sustained by the Third Circuit in Ngo, that provide for a periodic and meaningful review of petitioner's custody, and (b) the possibility that continued diplomatic efforts with Lithuania, Germany, or Russia might eventually result in petitioner's deportation. See also Ngo, 192 F.3d at 397.

a. Under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), the Attorney General may, following the initial 90-day removal period, in the exercise of her discretion, release a detained alien who is subject to a final order of removal, if she determines that the alien is neither a risk to the community nor unlikely to comply with the order of removal. Under current regulations, aliens like petitioner may request a formal custody review by the INS district director at any time and may appeal any resulting denial to the Board of Immigration Appeals (BIA). See 8 C.F.R. 236.1(d)(2)(ii) and (3)(iii), 241.4, 241.5. In determining whether an alien shall be released from detention, the district director may consider: the nature and seriousness of criminal convictions; other criminal history; sentence(s) imposed and time actually served; history of failures to appear; probation history; disciplinary problems while in custody; evidence of rehabilitative efforts or recidivism; equities in the United

States; and prior immigration violations and history. 8 C.F.R. 241.4.

As a supplement to that regulatory procedure for an alien to request release, INS established procedures in February 1999 under which the custody status of detained aliens whose removal is not immediately practicable will be subject to automatic review during the initial 90-day removal period and (if the alien is not released) every six months thereafter.[6] February 3, 1999 Memorandum For Regional Directors from Executive Associate Commissioner Michael A. Pearson (Pearson I) (attached as App. A, infra); see Pet. App. B at 287.

In addition, in August 1999, the Commissioner of INS instituted further procedures, which include centralized review of the custody status of detained aliens such as petitioner. See August 6, 1999 Memorandum For All Regional Directors from Executive Associate Commissioner Michael A. Pearson (Pearson II) (attached as App. B, infra).[7] Those new interim procedures, which were effective immediately and were intended to operate

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[6] Because petitioner was released in December 1997 pursuant to the district court order, the question of his detention has not been reviewed by INS under these supplementary procedures.

[7] The Attorney General and the Commissioner also announced their intention to issue regulations establishing a formal custody review program for such aliens modeled after the regulations establishing the Cuban Review Plan, which governs custody review of excludable Mariel Cubans whose repatriation to Cuba is not currently possible or practicable. See 8 C.F.R. 212.12. We have been informed that INS is finalizing the proposed regulations and intends to publish them soon for notice and comment.

pending anticipated permanent changes to the regulations themselves (see note 7, supra), instituted a two-level custody review for aliens subject to detention under Section 1231(a)(6) after the initial 90-day removal period. Under the interim procedures, the district director continues to conduct an initial custody review of an alien during the 90-day removal period, as described above, for aliens whose removal is unlikely to occur during the removal period. App. B, infra, 5a.

If the district director decides that the alien should be detained after the 90-day removal period, the next scheduled review by the district director is nine months from the date of the final removal order, or six months after the last custody review, whichever is later. App. B, infra, 6a. Written notice must be given to the alien 30 days in advance of the review, informing the alien of the factors that will be considered in making a custody determination and explaining that the alien will have an opportunity to demonstrate that he is not a flight risk or a danger to the community. Ibid.; see also 8 C.F.R. 241.4. An interview of the alien is mandatory at that custody review. The district director's determination following the interview is subject to review by a specialized team in INS Headquarters, in order to ensure an independent assessment outside the local district and consistency of decisions. App. B, infra, 6a-7a. The Headquarters panel may ratify the district director's decision, return the case to the district director for

reconsideration, or determine that additional information is required. Ibid. After the district director reviews his decision in light of INS Headquarters' evaluation, the district director notifies the alien of the final custody determination within 30 days of completion of the Headquarters review. Ibid.

INS thereafter conducts custody reviews every six months, alternating between a district director file review, and then a review that includes an interview at the alien's request and INS Headquarters review. App. B, infra, 6a. In either case, the alien must receive written notification of the final custody decision within 30 days of that decision. Ibid.

The comprehensive administrative procedures for review of the detention of petitioner and those similarly situated foreclose any characterization of his detention as permanent or indefinite. As the Third Circuit held in Ngo, the new interim procedures "provide reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States. 192 F.3d at 399.

b. The court of appeals also correctly ruled that it cannot "now be said with any real assurance" that petitioner "will never be deported" to his home country. Pet. App. B at 291. Because diplomatic efforts to arrange for petitioner's repatriation are continuing, and the court of appeals properly deferred to the Executive Branch in this matter of immigration and foreign policy, further review is not warranted.

Diplomatic efforts are committed by the Constitution to the Executive Branch, which -- because of its special expertise and access to information -- is responsible for bringing about their success and is best situated to predict whether that will happen. Petitioner's administrative detention by INS is consistent with the longstanding recognition that "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." Wong Wing v. United States, 163 U.S. 228, 235 (1896). The Court has since reaffirmed that Congress may vest release determinations regarding aliens subject to deportation in the Attorney General, subject to only the most deferential standard of review, Carlson, 342 U.S. at 537-542, and that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings." Salerno, 481 U.S. at 748.

Having reviewed the voluminous record provided by the petitioner and the government, the Fifth Circuit provided a detailed summary of INS's efforts to remove petitioner to either Lithuania or Germany. Pet. App. B at 291-294. It then concluded that, even if petitioner's removal may seem "problematical, difficult, and distant" in the present circumstances, that is not sufficient -- "[g]iven the traditional deference [courts] show to the other branches in matters of immigration policy" -- for

petitioner to meet his very high burden of showing that "deportation is impossible." Id. at 294. See also Ngo, 192 F.3d at 398 (concluding "[i]t is extremely unlikely" that the prolonged detention of an excludable alien from Vietnam would be permanent, in light of the diplomatic efforts between the United States and Vietnam to negotiate a repatriation agreement, even though the court characterized the negotiations as proceeding at an "agonizingly slow" rate).

Further, as the Fifth Circuit properly recognized, the courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects of deporting an alien both because of the Executive's greater expertise and access to all the relevant information and communications, and because of the need for the nation to speak with one voice on such matters. Pet. App. B at 295-297; see Aguirre-Aguirre, 526 U.S. at 425. Permitting the release of a former resident alien based on an ad hoc judicial determination regarding the probable length of his future detention would intrude into an area of confluence between the Executive's responsibilities for immigration law enforcement and diplomacy, signaling to other nations that their refusal to accept the repatriation of detained criminal aliens under final orders of deportation may result in release of the aliens back into American society, and perhaps thereby cause the other nations to ignore or disclaim their responsibility to accept the return of their own nationals who have violated the laws of the

United States. See Barrera-Echavarria, 44 F.3d at 1448 ("A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees."); Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (en banc)("[T]his approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."), aff'd, 472 U.S. 846 (1985). Thus, the Fifth Circuit correctly concluded that, given the government's plenary authority over immigration policy and its interest "in effectuating deportation of a resident alien and expulsion of an excludable alien," the government "may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." Pet. App. B at 297.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

APPENDIX A

U.S. Department o ce
Immigration and Nat. ..ation Service

HQCOU 90/16.51

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

FEB 3. 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety [90] day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Director.

Exhibit A

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of post order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody reviews. The District Director may use information obtained by local staff or detailees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation.

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.5.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. See 8 C.F.R. § 241.4.

8 C.F.R. § 241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(1)(C), 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the

alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;
(2) Other criminal history;
(3) Sentence(s) imposed and time actually served;
(4) History of failures to appear for court (defaults);
(5) Probation history;
(6) Disciplinary problems while incarcerated;
(7) Evidence of rehabilitative effort or recidivism;
(8) Equities in the United States; and
(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 236(c).
See October 7,1998 memorandum entitled INS Detention Use Policy.

APPENDIX B

U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

AUG 6 1999

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.[1] Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or release such an alien is made by the District Director. In the near future, the Service will begin the rulemaking process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

[1] See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable, and April 30, 1999: Supplemental Detention Procedures.

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to a Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

(1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order removal cases before the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.

(2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1) – (3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F. R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

(3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be considered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.

(4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.

(5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. See 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. See INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the preliminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

(a) Notice to Alien
(b) Notice of Interview
(c) Detained Alien Custody Review Worksheet
(d) Decision of Custody Review
(e) Decision to Continue Detention
(f) Decision to Release
(g) Custody Review Status Report